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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 546

GEORGE E. EDDY and SAMUEL SILBIGER,
Petitioners,

PRUDENCE BONDS CORPORATION, *et al.*

PETITION AND BRIEF FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL SILBIGER, *Pro se,*
Counsel for Petitioners.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349
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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners GEORGE E. EDDY and SAMUEL SILBIGER respectfully pray that writs of certiorari issue to review the three orders of the United States Court of Appeals for the Second Circuit, made in the above entitled matter. By one of said orders (R. 54) said petitioners' application for leave to appeal to said Court of Appeals from an order of the District Court awarding allowances to counsel was denied; by the second order (R. 87) the application by respondent Prudence Bonds Corporation to appeal from such order was granted, "limited to the question of conflict of interest represented"; by the third order (R. 96) on motion of respondents the appeal filed by petitioners from said order of allowances was dismissed (R. 96).

Opinions Below

The Court of Appeals for the Second Circuit rendered no opinion on the applications for the allowance of the appeals or on the motion to dismiss the appeal taken as of right.

Jurisdiction

The order denying petitioners' leave to appeal was entered October 21, 1949; the order granting the limited appeal to respondent was entered October 21, 1949; and the order dismissing petitioners' appeal taken as of right was entered November 7, 1949.

The jurisdiction of the Court is invoked under Section 240(a) of the Judicial Code, as amended 28 U. S. C. Sec. 347a and Section 24c of the Bankruptcy Act, as amended, 11 U. S. C. Sec. 47(c).

Questions Presented

1. Is the proceeding in the District Court below, instituted August 1945, for the determination of the conflicting claims of beneficiaries to distributive shares in Trust Funds, where the Trust Indenture was entered into between the New Corporation formed and the Trustee, in compliance with a decree made in January 1938, confirming a plan of corporate reorganization under Sec. 77 B of the Bankruptcy Act, a Bankruptcy proceeding?

2. Where attorneys for the successful claimants to the Trust Funds were awarded counsel fees by the District Court, is an appeal from the order of the District Court

subject to and governed by the provisions of Section 250 of the Bankruptcy Act?

3. Was the appeal which was duly taken, as of right, from the order of the District Court by petitioners herein, improperly dismissed by the Court of Appeals based solely on the ground that an allowance of the appeal by that Court was a prerequisite under Sec. 250 of the Bankruptcy Act?

4. Was the denial of the application of petitioners for leave to appeal from the order on allowance improper?

5. Was the granting of the application of respondent Prudence Bonds Corporation, and the limitation of the appeal to the question of the "conflict of interest represented" proper?

6. Did the Federal Court err in refusing to allow and take cognizance of petitioners' appeal, on the merits, and in arriving at a determination of what is reasonable on the basis of the rule in New York State, as a standard for the proper evaluation of services of counsel rendered on a contingent basis?

Statement

The plan for the reorganization of Prudence Bonds Corporation was confirmed on January 18, 1938 (Prior record, p. 341*), including separate plans of reorganization for each of the Eighteen Series of its First Mortgage Collateral Bonds.

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*"Prior record" refers to record in petition for writ of certiorori, *Prudence Realization Corporation* v. *Eddy*, 333 U. S. 845.

Pursuant to the confirmed plans, a new corporation with the same name as the Debtor was organized in February 1938, and it entered into Supplemental Trust agreements with City Farmers Trust Company, as Successor trustee of each of such eighteen series of bonds (Prior record 345; 351). These agreements were approved by the District Court and the plans were made effective as of March 1st, 1938 (Prior record 116-117).

As directed by the order of the District Court, the indenture trustees who were superseded by the new trustee, transferred the respective trust res to the successor trustee, and, pursuant to such order, filed their respective accounts and prayed a judicial settlement thereof (Prior record 117). Likewise, pursuant to such order, the Debtor and its Reorganization Trustees, as of March 1, 1938, transferred and assigned all their rights and interests in the Debtor's estate and the equities in the Trust Estate to the new corporation (Prior record 117). The Debtor's Trustees have not filed their account, and no final order closing the reorganization proceeding has as yet been entered.

Extensive litigation then ensued relating to the accounts of the superseded trustees, resulting in the cases of *Central Hanover Bank & Trust Co.* v. *President and Directors of the Manhattan Company,* 105 F. 2d 130; *Manufacturers Trust Co.* v. *Kelby,* 125 F. 2d 650, cert. denied 316 U. S. 697; *Brooklyn Trust Co.* v. *Kelby,* 134 F. 2d 105, cert. denied 319 U. S. 767; *President etc. of the Manhattan Co.* v. *Kelby,* 147 F. 2d 465, cert. denied 324 U. S. 866; *Eddy* v. *Kelsey,* 148 F. 2d 323. Also, in a prior application to this Court for a writ of certiorari to the Court of Appeals for the Second Circuit involving a situation relative to counsel

fees awarded on such accounting proceedings, this Court denied certiorari 319 U. S. 755 and in relation to an appeal on the merits with respect to counsel fees awarded, affirmed by the Court of Appeals by a divided court, *Eddy* v. *Kelby*, 163 F. 2d 56, this Court denied the petition for a writ. 322 U. S. 836.

In the reorganization proceeding, petitioner Silbiger appeared as attorney for George E. Eddy and also represented Bessie B. Reilly and Katherine Born. Mr. Eddy was the holder of bonds in eleven series, AA, 3rd, 5th, 6th, 8th, 12th, 13th, 14th, 15th, 16th and 18th; Bessie B. Reilly held bonds in the 11th Series, and Katherine Born in the 4th and 16th Series.

Petitioner Silbiger appeared as attorney for each of his clients in the respective accounting proceedings in which they held bonds, filed objections for each of them respectively in the series in which they were bondholders, and on the conclusion of such proceedings was awarded compensation for his services payable out of the funds realized by way of settlement with or a surcharge of such trustees (Prior record, 138).

From the time of the confirmation of the plans in 1938, and as of from March 1st, 1938, the new corporation serviced the collateral securing the respective trust funds, and the successor trustee performed its functions, pursuant to the plans and the terms of the Supplemental Trust Indentures.

After this Court denied the petition of *President & Directors of the Manhattan Co.* as Trustee of the 5th and 9th Series for the writ of certiorari respecting its account-

ing as decided in 147 F. 2d 465, 324 U. S. 866, the surcharge decreed against said trustee was paid (Prior record, 142), and the New Corporation on August 2, 1945, initiated proceedings in the District Court for instructions as to the allocation and distribution of the trust funds respectively in Series Fifth and Ninth (Prior record, 108, 532). Later, it applied for similar instructions as to the Sixth Series, and City Bank Farmers Trust Co. initiated its proceeding for such instructions as to all series except the Fifteenth (Prior record, 492, 429).

By the process of the slow liquidation of the trusts created by the plans and supplemental trust agreements, the trust funds were in such condition that in eight of the series the trust funds were adequate to pay the principal of the priority bonds held by the general public, and to leave a substantial surplus, aggregating approximately $2,000,000. In the other ten series the trust funds were inadequate to pay the principal of the publicly held bonds. Among the deficient series as to principal were the Fourth and Sixteenth Series, in which Katherine Born held bonds, and the Eleventh Series, in which Bessie B. Reilly held bonds.

Prudence Realization Corporation, Successor to The Prudence Company, Inc., the guarantor of the publicly held bonds as to principal and interest at the rate of 5½%, was the holder of subordinate bonds aggregating $1,910,300 distributed in all eighteen series, and President and Directors of the Manhattan Company was the holder of a subordinate lien on the Fifth Series Trust Fund in the amount of $85,825 and on the Ninth Series Trust Fund in the sum of $88,124.98.

The condition of the Trust Funds showing an excess over the amount of principal due on the publicly held bonds, the subordinate liens on such funds, and the surplus is as follows:

Series	*Excess over principal due Publicly Held Bonds*		*Subordinate Bonds of Prudence Realization Corporation*	*Subordinate Liens*	*Surplus*
AA	$ 288,599.29		$ 138,100.00		$150,499.29
5th	360,610.22		67,200.00	$ 85,825.00	207,585.23
6th	182,249.72	($311,200)—	182,249.72		0
8th	207,368.21		193,200.00		77,168.21
9th	463,285.24		105,700.00	88,124.98	269,460.26
12th	209,116.50	(390,500)—	209,116.50		0
17th	135,840.99		92,500.00		43,340.99
18th	84,383.62		21,800.00		62,583.62
	$1,994,453.79		$1,009,866.22	$173,969.98	$810,637.59

In each of said series the excess over the principal due the publicly held bonds was inadequate to pay the deficiencies of interest at 5½% per annum due on the Bonds (Prior record, 54, 547).

Upon the reports and recommendation of the Special Master relating to the Fifth and Ninth Series proceedings, the District Court rejected the contention of the public bondholders that they were entitled to receive full payment of their bonds with interest at 5½% per annum; sustained the contentions of Prudence Realization Corporation that it was entitled to payment of its subordinate bonds aggregating $1,009,866.22; sustained the claim of President & Directors of the Manhattan Company to the payment of the liens aggregating $173,969.98; rejected the claim of President & Directors of the Manhattan Co. to the entire surplus then remaining in the Fifth Series and to the

surplus in the Ninth Series to the extent of $120,007.98 by way of recoupment of the sums with which it had been surcharged, and adjudged that the said surpluses in six of said series, aggregating $810,637.59* was payable to City Bank Farmers Trust Company as Trustee of the other Series of Bonds, where there was a deficiency of collateral to pay the outstanding bonds, subordinate as well as unsubordinate. (*R. Prudence Realization Corporation* v. *Eddy,* 333 U. S. 845; Petition for Certiorari Brief, Appendix B, at p. 25).*

Four orders relating respectively to the Fifth, Sixth, Ninth and All Series allocation proceedings were thereupon entered. On the consolidated appeals from said orders the Court of Appeals reversed the District Judge (*Eddy* v. *Prudence Bonds Corporation,* 165 F. 2d 157) and this Court denied the petition of Prudence Realization Corporation for a writ of certiorari to the Court of Appeals (333 U. S. 845).

It is for his services in these allocation proceedings in the District Court, the Court of Appeals for the Second District and this Court, whereby petitioner successfully sustained the exclusive rights of the Public Bondholders in Series AA, 5th, 6th, 8th, 9th, 12th, 17th and 18th to the sums aggregating approximately $2,000,000 that petitioner applied to the District Court to fix the amount of his liens on the respective trust funds in said series in the aggregate amount of $459,500 and unrecouped expenses in the sum

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*The slight variance in the figures is due to the fact that the figure $774,252.99 reflects the condition of the trust funds as of August 31, 1946, while the figure stated shows the condition as of August 31, 1948.

of $1,002.74. Objections to the award of any allowance to Silbiger were interposed by the respondents Prudence Bonds Corporation and Reconstruction Finance Corporation.

Petitioner Silbiger's application, as well as the requests of other counsel were referred to a Special Master for hearing and report, and he recommended that allowances be awarded to all counsel in the aggregate sum of $102,500, equivalent to approximately 5% of the sums involved in the mutually exclusive antagonistic claims to the funds. Of this total he recommended that $75,000 be awarded to petitioner.

The learned District Judge in passing on the report of the Special Master increased the total award to all counsel to $107,500 by increasing from $15,000 to $20,000 the allowance recommended to Weil, Gotshal & Manges, Esqs. Except for such modification of the recommendation of the Special Master the opinion of the District Judge states "I do not think I can, or should, substitute my own views for those expressed by the Special Master." The order awarding such allowances was entered July 29, 1949.

Because petitioner Silbiger considered that the award to him under the circumstances of this case was grossly inadequate and predicated on erroneous theories of law, petitioners sought a review by the Court of Appeals. Their Notice of Appeal was served on September 6, 1949. As a precautionary measure, petitioners likewise filed a petition in the Court of Appeals for leave to appeal. Respondents Prudence Bonds Corporation and Reconstruction Finance Corporation filed a notice of appeal on September

6, 1949, and likewise petitioned for leave to appeal. The respective orders denying petitioners leave to appeal and granting respondents limited leave to appeal on the issue raised of a conflict of interest represented, were made on October 21, 1949, and on November 7th, 1949 petitioners' appeal taken as of right was dismissed on motion of the respondents.

Specifications of Errors to be Urged

The Court of Appeals for the Second Circuit erred:

1. In construing Section 250 of the Bankruptcy Act as applicable to the case at bar.

2. In summarily dismissing petitioners' appeal.

3. In refusing to grant petitioners leave to appeal, if an appeal does not lie as of right.

4. In granting to respondents Prudence Bonds Corporation and R.F.C. leave to appeal limited to the issue of a "conflict of interest represented."

5. In failing to take cognizance of and reviewing the whole case on the merits.

And that the District Court erred:

a. In its ruling that it could not substitute its "own views for those expressed by the Special Master."

b. In failing to arrive at his own independent informed opinion as to the New York rule in evaluating services of counsel and applying it to the facts in this case.

c. In failing to decide that within the law and the rule as applied in New York State the fees requested by petitioner Silbiger are fair and reasonable and should be allowed him.

Reasons for granting the Writs

The refusal of the Circuit Court of Appeals for the Second Circuit to review the decision of the District Court on the merits presents an important question of Federal Law and Procedure which ought to be settled by this Court.

The failure of the District Court to arrive at an independent and informed judgment of what, under the rules in New York State, constitutes a reasonable fee for counsel rendering services on a contingent basis, and to apply such rule to the facts of this case, violates established principles of law and conflicts with the decisions of this Court. *Erie* v. *Tompkins,* 304 U. S. 64.

The issues presented in this case involve the proper relationships between attorney and clients, as also between attorneys and the Court, and this Court should authoritatively establish and define what is "reasonable" and what constitutes an "abuse of discretion" when a court is determining or passing upon the reasonable value of attorneys' services, and by what standards such reasonable value is to be arrived at, so that both the bench and bar may know that the rights of attorneys are according to such standards and measured thereby. In that way, the value of an attorney's services will not be dependent upon the mere accident of the determination thereof being thrown into the lap of Judge A, B, C, or D.

WHEREFORE, your petitioners respectfully request that Writs of Certiorari be granted as prayed.

SAMUEL SILBIGER, *pro se.*
Attorney for Petitioners.

Dated, January 14th, 1950.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

SAMUEL SILBIGER, being duly sworn, says: That he is attorney for petitioner George E. Eddy and is also one of the petitioners herein; that he has read and knows the contents of the within petition and it is true in all respects as he verily believes.

SAMUEL SILBIGER.

Sworn to before me this
14th day of January, 1950.

FRANCES W. SYBELL
Notary Public, State of New York
Qualified in Kings County
Kings Co. Clk's No. 686, Reg. 1341-S-0
N. Y. Co. Clk's No. 2066, Reg. No. 1998-S-0
Queens Co. Clk's No. 1153, Reg. No. 282-S-0
Nassau Co. Clerk's No. 64-S-50
Commission Expires March 30, 1950

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

The appeal to the Circuit Court was properly taken as of right.

The services for which Appellee Silbiger sought to have his lien fixed and determined by the Court were not such as are comprised within or intended to be regulated by Article XII of the Bankruptcy Act.

Sec. 243 of the Act provides:

> "The Judge may allow reasonable compensation for services rendered * * * by creditors * * * or the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of the plan,

> or in connection with the administration of the estate. In fixing any such allowances, the Judge shall give consideration only to the services which contributed to the plan confirmed, or which were beneficial in the administration of the estate * * *."

Obviously the provisions of Sec. 250* of the Act apply to appeals from allowances awarded pursuant to the power conferred upon the Court by Section 243, and where the power to award allowances does not stem from such section, but from independent equity considerations, any party aggrieved by a decision of the Judge on the question of his lien for services has the same right of appeal that exists in connection with an ordinary Equity proceeding.

The services for which Sec. 243 confers the discretion on the Judge to award allowances are such services as relate to the formulation, adoption or rejection of a plan, or the administration of the estate during the process of such formulation, adoption or rejection of a plan.

The power so conferred by said Section was exercised by the Judge as far back as 1938 and awards of allowances were made to counsel who rendered services relating to such formulation, adoption or rejection of the plan and the administration of the estate. Those allowances were reviewed by the Court of Appeals in 122 F. 2d, 258.

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* Sec. 250. Appeals *may be taken* in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, *and* any, in the manner and within the time provided for appeals by this Act, be taken to *and allowed* by the circuit court of appeals *independently of other appeals in the proceeding,* and shall be summarily heard upon the original papers.

When, in 1938, pursuant to the decree of the District Court, the Debtor and its trustee transferred and assigned all their rights and interests to the New Corporation and the indenture trustees transferred the respective trust res to the Successor trustee, the plan of reorganization was consummated and became effective as of March 1, 1938. Thereafter the several trust estates and trust res were not being administered by the Court, but were administered by the Successor Trustee of the several trust funds and the respondent Prudence Bonds Corporation pursuant to the Supplemental Agreements entered into between them.

The proceedings for instructions by the new corporation and the Successor Trustee were suits in equity to obtain an adjudication of the rights of conflicting claimants to the trust funds. The power of the Court to fix and grant allowances to counsel for services in such proceedings is not rooted in any provision of the Bankruptcy Act, but stems from the broad rules of the common law and equity as established in the case law and as preserved in New York State by Sec. 475 of the Judiciary Law, which confers upon an attorney a lien for his services on a cause of action or any judgment or decree entered therein. *In re Heinsheimer,* 214 N. Y. 361, 364. The proceeding to establish such lien is a separate Special proceeding. *Smith* v. *First National Bank of Albany,* 103 Misc. 274, 170 N. Y. S. 595.

The establishment of an attorney's charging lien has long been a recognized right in the Federal Courts. In the case of *Sprague* v. *Ticonic Bank,* 307 U. S. 161, this Court said:

> "The allowance of such costs in appropriate situations is part of the historic equity jurisdiction

in federal courts. The suits 'in equity' of which these Courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore have been evolved in the English Court of Chancery, subject of course, to modifications by Congress * * *. To be sure, the usual case is where through the complainant's efforts a fund is recovered in which others share. * * * "

POINT II

(a) The fee of $75,000 awarded to Mr. Silbiger is grossly inadequate, unfair and unreasonable and contrary to equity and the established criteria of precedents and the law.

(b) The fees requested by Mr. Silbiger in the aggregate sum of $459,500.00 are fair, reasonable and equitable, commensurate with the benefits conferred and are supported by equitable principle, controlling precedents and the law.

The Special Master based his recommendations on the theory that "Mr. Silbiger's contention that he is entitled to a lien to the extent of 22 per cent of each fund in series in which there are sufficient funds to pay interest on bonds, even though he did not represent bondholders in each series, is not tenable". The conclusion is not predicated on any precedent cited by the Master, and the only case, *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 165, considered by him, is a controlling authority to the contrary.

The Master recognized that compensation to Mr. Silbiger must be commensurate with the benefits derived from

his services. What he failed to point out in his report, is the amount of the benefits upon which he computed or based his estimate of the value of Mr. Silbiger's services, or the ratio of such value to the benefits. Obviously, as he ruled that Mr. Silbiger was not entitled to any allowance in the Sixth, Ninth and Seventeenth Series, because he had no client owning bonds in said series, he failed to take into consideration the $781,376.05 realized by the bondholders in such series. By his ruling that here was but one proceeding, *i.e.*, that relating to the Fifth Series, he eliminated from consideration all benefits accruing to any bondholders except the Fifth Series—the benefits to the bondholders in which series he estimated at $400,000. On this basis he arrived at his recommendation of $100,000 as the value of the combined services of Mr. Silbiger, Mr. Miller and Weil, Gotshal & Manges, Esqs..

Concededly, in an equitable proceeding, allowance of counsel fees is in the discretion of the Court. That does not mean that it is an arbitrary or unlimited discretion, but it means that the Court must in fact exercise its discretion, and where under the law and principles of equity jurisprudence, allowances are to be made, it is the duty of the Court to arrive at an informed judgment of what is fair and reasonable. The criterion of what is the fair and reasonable value of legal services is the customary compensation paid counsel where the fee could be fixed by agreement in advance and the usual rate of compensation for such services. *Middleton* v. *Bankers, etc.*, 37 F. 2d 524.

In *Woodbury* v. *Andrew Jergens Co.*, 37 F. (2d) 749, the Court says:

> "The value of a lawyer's services is not measured by time or labor merely. The practice of law is an

art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter. The exercise of these faculties may occur at any stage in a case, though their influence on the course of the proceedings may not be established till its outcome. In order, therefore, accurately to chancer the value of a lawyer's services, *one must always examine them in the light of the event.* * * * " (Italics supplied.)

In New York State agreements for contingent fees are sustained and it has been held that a contingent fee of one-half of the recovery is not, of itself, unconscionable, in the absence of fraud, or unless the nature of the claim is such as to evince a disposition on the attorney's part to take an undue advantage over his client. *Morehouse* v. *Brooklyn Heights R. Co.*, 195 N. Y. 537; *Matter of Fitzsimmons*, 174 N. Y. 15; *Friedman* v. *Mindlin*, 91 Misc. 473, 155 N. Y. S. 295.

Such contingent fee contracts are enforceable and adjudged fair, equitable and conscionable regardless of how large a sum might ultimately be recovered. *Ransom* v. *Ransom*, 147 App. Div. 835, 133 N. Y. S. 173.

In the case last cited there was involved the establishment of a widow's claim to a share in her deceased husband's estate. Such share was of the value of $400,000 and it was held that a contingent fee contract to pay counsel 25 per cent of the sum realized was not unreasonable or unconscionable.

So, where the rate of compensation to the benefits has not been agreed on in advance, and it devolves upon the Court to determine the value of an attorney's services,

what rate is fair and reasonable under the circumstances is a fact to be decided by the Court upon the evidence and the customary usage and practice of the legal profession and the Courts.

The cases at bar are analogous to stockholders' derivative suits and are representative in character. In fact, Mr. Eddy stepped into the shoes of the Trustee of the various trust funds—by whose failure to come forward and protect the trust funds against illegal assault, it became necessary for a bondholder to step into the breach and, at his risk, assume the burden of protecting the rights of all bondholders.

Recently, the Court of Appeals for the Second Circuit in *Certainteed Products Corporation* v. *John A. Topping,* 171 F. 2d 241, referred to what constitutes reasonable counsel fees and cited the articles of Mr. Hornstein, 39 Col. L. Rev. 784; 42 Col. L. Rev. 574, 587; 47 Col. L. Rev. 1, 24, N. 3 p. 15.

A perusal and analysis of the cases cited in said articles indicate that the courts consistently approach the question of what is a reasonable counsel fee, where the services are rendered upon a contingent basis, from the point of view that the awards to counsel should not be niggardly but rather liberal as in cases of salvage. The percentage of the benefits awarded as counsel fees usually range between 20 to 33 1/3 per cent of the sum realized or saved, and the courts usually have not been timid because of the huge sum that might be involved.

In *Murphy* v. *North American Light & Power Co.,* 33 Fed. Sup. 567, as in the case at bar, no estate or fund was

created. There, the question involved was one affecting the priority rights of preferred stockholders under a contract. Here similarly was involved the priority rights of bondholders under a contract. The Court said:

> "Allowances in causes of this kind, however, should not be niggardly for appetite for effort in corporate therapeutics should, as in salvage and in bankruptcy cases, be encouraged. In re Osofsky, 50 F. 2d 925, at page 927."

Cited with approval by the Court of Appeals for the Second Circuit in *Smolowe* v. *Delendo Corporation,* 136 F. 2d 231 at 241.

In *Neuberger* v. *Barrett,* 180 Misc. 222, 39 N. Y. S. 2d 575, there was realized by way of settlement—not by virtue of a judgment after trial—the sum of $653,744.72, plus an indeterminate amount of saving for the future. On petition for allowances to counsel, the Court said:

> "Consideration must be given to the fact that fees here, as in most of these cases, were contingent on some recovery by settlement or otherwise. The attorneys and accountants always took the risk that their time and efforts might go for naught.
>
> "Most of the work is generally done before trial, so even though there was no trial here, I have concluded that $200,000, *or about 30 per cent of the fund* should be set aside for distribution among those attorneys and accountants who contributed to its creation, plus $568.35 which is the total of the disbursements incurred in the process." (Italics supplied.)

In *Winkelman* v. *General Motors Corporation,* 48 Fed. Supp. 504, a settlement of a stockholders' derivative action

resulted in a recovery of $4,500,000. Several lawyers and law firms were participants in the litigation. Allowances were made including $100,000 for accountants' fees and disbursements, aggregating $895,000, approximately 20 per cent of the recovery.

It will be observed that in the cases listed by Mr. Hornstein, 39 Col. Law Rev. 1939, p. 784, the three cases nearest approximating the result achieved in the case at bar are *Adams* v. *Rockefeller,* where the results achieved were $2,500,000 and the allowance awarded $833,333.33 or at the ratio of *33 1/3 per cent*; *Bookbinder* v. *Chase Nat. Bank,* the sum realized was $2,500,000, and the fees awarded $625,000 or *25 per cent;* and *Gallin* v. *National City Bank,* where the sum realized was $1,844,642.21, and the fees awarded were $427,500 or *25 per cent.*

The rationalization of the theory on which the decision in *Adams* v. *Rockefeller supra,* was based found approval by Valente, *J.* in *Benedict* v. *Seagrave,* N. Y. L. J. June 24, 1937, p. 3190, col. 4 In that case the amount involved was $723,500 and the allowance to counsel was fixed at 33 1/3 per cent or $239,605.03. The Court said:

> "Under all the facts and circumstances of this case I am convinced that the fee requested by the plaintiffs' accountants, and consented to by the defendant corporation, is fair and reasonable.
>
> "A similar application came up in the case of *Edwin Adams et al.* v. *William Rockefeller et al.* (District Court, Southern District of New York, No. 138 - E. 13-63.) That case involved the settlement of a similar derivative stockholders' action for the sum of $2,500,000. A fee of one-third of this amount, or $833,333.67, was awarded plaintiffs' attorneys as

counsel fee. In an opinion rendered December 28, 1920, Judge Hough, in approving the settlement and awarding that amount to the plaintiffs' attorneys, stated in part as follows: 'It is substantially admitted that the plaintiffs have but furnished their names; the corporate defendant has been no more than a spectator, the work has been done wholly by counsel on both sides, and so far as any fruit is produced, it is wholly the work of plaintiff's counsel. Large as the settlement is, I see no reason why the rule usual in this jurisdiction in respect to recoveries of sums largely speculative by counsel operating on contingent fees should not be applied, and I award one-third of the settlement to plaintiffs' counsel."

This case came up again before Judge Hough in a subsequent application to apportion counsel fees among the various attorneys in the litigation, and in connection with that application Judge Hough further stated in an opinion rendered April 6, 1921:

> "The fee or remuneration awarded to the solicitor of record or his associates was, in appearance, very large indeed, but it was not directed to be paid principally for legal or intellectual service at the law, although great industry and ability has been manifested on the part of the plaintiffs herein. It was and in my judgment is payable for great courage and business skill in absolutely creating a very large sum of money which the recipient thereof had never had courage to go after, and had indeed refused even to ask for—much less had that recipient been willing to sue and labor therefor. Consequently, the recovery was and in my opinion should be treated like a case of salvage on a derelict."

If as the Court stated in *Dickinson* v. *Cowin*, 309 U. S. 382, the purpose of Section 250 of the Bankruptcy Act is to avoid frivolous appeals from orders and allowances, and if the attempted appeal by petitioner is to be considered as governed by the provision of said Section, then, it cannot, in the light of the established precedents cited above, justly be said that such attempted appeal is "frivolous." The Court of Appeals in the exercise of its discretion should have granted the petition of Appellees for leave to appeal, and reviewed the whole controversy on the merits.

Reputable attorneys are keenly sensitive to their relationship to their clients, the Court and the public. They seek to observe the proprieties with meticulous care, to avoid the finger of scorn and ridicule being pointed at them or the profession and to avoid any breach in their conduct which will justify the slightest reproach or censure by the Court. Among these proprieties must be included a fair approach by them to their clients and to the Court in the charging of fees for services.

Obviously, therefore, the law is in a hopeless, chaotic state if what is "reasonable" for an attorney to charge and expect to be awarded for his services is entirely dependent upon accident, whether he appears before a Judge Hough, a Judge Valente, or any Judge of like psychology, as indicated in the precedents cited, or before a Judge whose mental reactions are in complete conflict with the generally accepted view that 25 per cent to 33 1/3 per cent of the sums recovered or saved is what an attorney can and should charge when he accepts a retainer and performs services entirely upon a contingent basis. If, under the generally accepted view, 25 per cent to 33 1/3 per cent is

reasonable, a limitation of counsel's recovery to but 5 per cent of the sum recovered and saved to the clients is unjustifiable, indefensible and grossly inadequate. The limitation in the case at bar of the fees to approximately 5 per cent is hopelessly irreconcilable with the precedents—and both such precedents and the instant case cannot be correct.

A review of the decision below is therefore urgent, so that if the instant case represents the correct view, it may be authoritatively established, and counsel then will not be subject to criticism, or be the victims of recrimination and abuse, as they will not then seek compensation in circumstances as in the case at bar, so greatly out of proportion to what the award made by the Court below determines is fair and reasonable.

CONCLUSION

The petition for writs of certiorari should be granted.

Dated: New York, January 16th, 1950.

Samuel Silbiger, *Pro se,*
Counsel for Petitioners.